Supreme Court, U.S.
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No. 88-1363

In The

Supreme Court of the United States

October Term, 1988

RICHARD A. NEYHARD, Individually and/or as Administrator of the Estate of CHRISTOPHER K. NEYHARD, Deceased, and on behalf of all members of a class of individuals similarly situated,

Petitioner,

vs.

STATE FARM INSURANCE COMPANY,

Respondent.

BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Whether a State appellate court's order dismissing an appeal because of the absence of a proper, certified record violated any constitutional rights of the appellant where the appellant had the ability and duty under state law to take steps to ensure that a proper, certified record was made available to the appellate court in order to allow it to consider his appeal?

2. Whether a State appellate court's order dismissing an appeal because of the absence of a proper, certified record violated any constitutional rights of the appellate, even assuming, *arguendo,* that that order resulted solely from the negligent failure of the clerk of the lower court to prepare and certify a proper record, when state law provides a tort remedy for the negligent acts of judicial officials such as the clerk of courts?

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COUNTERSTATEMENT OF THE CASE

Petitioner Richard A. Neyhard ("Neyhard") seeks review of an order of the Superior Court of Pennsylvania dismissing his appeal because of the absence of a proper, certified record upon which that appeal could be decided. After the entry of that order, petitioner unsuccessfully sought reargument before the Superior Court. Thereafter, he sought discretionary review of that order before the Supreme Court of Pennsylvania. After initially granting allocatur, and hearing argument on the merits of the appeal, the Pennsylvania Supreme Court dismissed the appeal as having been improvidently granted. (10a).

The underlying action was a class action in which petitioner sought to represent the executors and administrators of estates of persons insured by respondent State Farm Mutual Automobile Insurance Company ("State Farm") who were allegedly entitled to certain benefits under the now-repealed Pennsylvania No-fault Motor Vehicle Insurance Act, 40 P.S. § 1009.101 *et seq.* (repealed 1984). The trial court denied petitioner's request that it certify a state-wide class, instead certifying a class consisting only of those potential claimants who had some "minimum contacts" with Philadelphia County.[1] Subsequently, the trial court granted summary judgment in

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[1] The excluded putative class members then filed a second class action lawsuit in federal court. *Kromnick v. State Farm Mutual Automobile Insurance Company,* No. 85-5824 (E.D. Pa.). (24a). The federal district court has since certified a statewide plaintiff class, excluding only those Philadelphia-related plaintiffs who have been certified as a class in the *Neyhard* case.

favor of State Farm on the ground that petitioner's own claim was barred by the applicable statute of limitations.[2]

Neyhard appealed the entry of summary judgment to the Superior Court of Pennsylvania. On September 25, 1986, the Superior Court entered a *per curiam* order dismissing Neyhard's appeal. (9a).[3] In its accompanying memorandum, the panel majority explained:

> With regard to [this] appeal . . . *nothing has been certified*. Because the list of docket entries has not been certified and does not include any of the various documents relative to the summary judgment motion upon which the order appealed . . . was made, we have no duly certified record of the basis of the motion for summary judgment or the objection thereto. *Without any record* of the reason summary judgment was sought and the specific objections raised thereto by appellant, *we cannot review the order*, and the appeal must be dismissed.

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[2] Neyhard had admitted that he failed to file suit within the applicable two-year statute of limitations period, but contended that the statutory period had been tolled by the filing of an earlier class action. The Pennsylvania Supreme Court has since rejected this same contention in another case. *Cunningham v. INA*, 515 Pa. 486, 530 A.2d 407 (1987), *cert. den.*, 56 U.S.L.W. 3460 (Jan. 11, 1988).

[3] Neyhard also appealed the class certification order. That appeal was quashed on the grounds that, because of the order dismissing his claim, he had no standing to pursue appellate review of the issues raised in that appeal and that there was no other appellant before the appellate court who did have such standing. Neyhard did not seek review of the decision regarding his lack of standing in the Pennsylvania Supreme Court. It is, therefore, not before this Court.

(5a) (emphasis added). The court also noted that the absence of a properly certified record "absolutely impedes this Court from conducting any meaningful appellate review because there is no official record of which we can take notice." (5a).

Thereafter, as noted, Neyhard filed an Application for Reargument, or, in the Alternative, Petition for Reconsideration of the Superior Court's Order. That Application did not raise any constitutional challenges to the Superior Court's decision, but rather claimed only that the Court had abused its discretion in dismissing Neyhard's appeal. The Superior Court denied Neyhard's Application. (42a). His subsequent appeal to the Pennsylvania Supreme Court was also dismissed as having been improvidently granted. (10a).

REASONS FOR DENYING THE WRIT

Petitioner has failed to state a Federal claim requiring review by this Court

1. Petitioner claims that a variety of constitutional violations occurred when the Superior Court of Pennsylvania dismissed his appeal on the procedural ground that no properly certified, official record had been received by that Court. Each of petitioner's claims is based on the premise that he was the innocent and powerless victim of the trial court's negligence in failing to transmit a proper record to the appellate court. Based on that premise, Neyhard claims that dismissal of his appeal was arbitrary and capricious and, therefore, in violation of the Due Process and Equal Protection clauses of the Constitution.

That premise is, however, wholly incorrect. To the contrary, pertitioner, as appellant before a Pennsylvania appellate court, had both the ability and the duty to ensure that that court had a proper record before it when deciding his appeal. Thus, petitioner was neither innocent nor powerless and the appellate court acted well within constitutional bounds in dismissing his appeal.

Specifically, Rule 1926 of the Pennsylvania Rules of Appellate Procedure explicitly provides for correction of the record, either before or after its transmission to the appellate court, by stipulation of the parties or order of either the lower or appellate court.

According to the preeminent commentator on Pennsylvania appellate practice:

> Pa.R.A.P. 1926 provides an appellant with the opportunity to eliminate potentially troublesome impediments to appellate review by making necessary corrections or modifications to the record on appeal once the record is lodged with the appellate court. In order to take advantage of this opportunity, however, counsel for appellant must actually review the record that is transmitted from the trial court to the appellate court. The record may be reviewed before it is transmitted from the trial court to the appellate court. The record may be reviewed at the appellate court after it is transmitted. . . . Only through such a review can counsel for appellant be sure that the appellate court is in possession of the entire record on appeal. Where it is determined that, through ministerial error, the prothonotary of the lower court has omitted to send portions of the original record to the appellate court, counsel can stipulate to supplement the original record with the omitted material, and praecipe the prothonotary of the trial court to prepare and transmit a supplemental original record to the appellate court.

1 Pennsylvania Appellate Practice § 1926:7 at 517. This same commentator also suggests that:

> [c]ounsel for the parties should monitor the compilation and transmission of the original record from the lower court to the appellate court as a matter of course. By so doing, counsel will be able to insure that all of the components of the original record are actually transmitted to the appellate court.

1 Pennsylvania Appellate Practice § 1935:4 at 533. Thus, the petitioner, through his counsel, clearly had the ability to seek the additions or corrections to the record which would have allowed the Superior Court properly to consider and decide his appeal. If he had done so, he would presumably have discovered and corrected the deficienices which resulted in dismissal of his appeal.[4]

In this critical respect, he is different from the petitioner in *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982), who had *no* power to take the action necessary to avoid dismissal of his claims – the holding of a conference. *Id.* at 444. Petitioner here had a mechanism readily available by which to assure that an adequate and accurate record was submitted to the Superior Court. He simply failed to utilize that mechanism, mistakenly relying on others to protect his rights and carry out his

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[4] Petitioner denies he had the power to correct the record, but does not claim he attempted to do so. Clearly, Rule 1926 provides a mechanism for doing so. There is no basis to conclude that, if he had tried, petitioner would have been unable to utilize that rule to ensure that the appellate court had a proper, certified record before it in deciding his appeal. Indeed, any presumption should be to the contrary.

duties. Thus, this is not a case where an innocent[5] or powerless litigant is being deprived of his opportunity to litigate because of circumstances beyond his control.

Petitioner also had the duty, as well as the power, to ensure that the appellate court had an adequate and proper record before it. It was his appeal and he, therefore, had an obligation to take all steps within his power to ensure that the case was ready for appellate review. Those steps include ensuring that the appellate court is provided with a proper record. *See, e.g., Commonwealth v. Walsh*, 252 Pa. Super. 111, 114, 380 A.2d 1307, 1308 (1977) ("The responsibility for insuring that the record accurately reflects the proceedings before the lower court rests with the lower court *and the parties*" (emphasis added)); 1 Pennsylvania Appellate Practice § 1926:2 at 514 ("The obvious objective in providing a mechanism for the correction and modification of the record on appeal is to present the appellate court with a complete record at the time the appellate court addresses the merits of the issues on appeal. *This is the joint responsibility of the parties*

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[5] Indeed, petitioner is represented by able, experienced counsel who has brought a number of cases similar to this one against State Farm and other insurance carriers. *See, e.g., Kromnick v. State Farm*, C.A. No. 85-5824 (E.D. Pa.); *Hardy v. Nationwide Ins. Co.*, No. 5863 August Term 1982 (C.P. Phila.); *King v. Liberty Mutual Ins. Co.*, No. 340 December Term 1980 (C.P. Phila.). In fact, plaintiff himself has been a party to appellate proceedings in other similar cases. *Wilson v. State Farm Mutual Insurance Company*, 512 Pa. 486, 517 A.2d 944 (1986). Thus, his suggestion that he is a naive victim of Pennsylvania's judicial system is disingenuous at best.

and the lower court" (emphasis added)); *See also Mountaintop Area Joint Sanitary Authority v. Malone*, 73 Pa. Commw. 217, 457 A.2d 1033 (1983). Petitioner simply failed to carry out that duty.

At the time that petitioner's appeal was dismissed by the Superior Court, Pennsylvania's Rules of Appellate Procedure mirrored the Federal Rules in providing that:

> Failure of an appellant to take any step other than the timely filing of a notice of appeal does not affect the validity of the appeal, but is ground only for such action as the appellate court deems appropriate, which may include dismissal of the appeal.

Pa.R.A.P. 902 (amended 1987). *Compare* Fed. R.A.P. 3(a). Certainly, that rule authorized dismissal of an appeal where, as here, an appellant failed to carry out his responsibility to ensure that the appellate court had before it a proper, certified record upon which to decide his appeal.[6]

There can be no serious question that appellate courts have the power to promulgate rules governing practice before them. There can also be no serious question that they have the power to enforce them. *Brooks v. Fitch*, 642 F.2d 46, 48 (3d Cir. 1981); *Kushner v. Winterthur Swiss Ins. Co.*, 620 F.2d 404 (3d Cir. 1980). The Pennsylvania rules involved in this case were rationally related to

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[6] The Rules have since been amended to replace the reference to dismissal of the appeal with the following: "such action as the appellate court deems appropriate, which may include, but is not limited to, remand of the matter to the lower court so that the omitted procedural step can be taken." Pa. R.A.P. 902, as amended January 31, 1987. While that rule apparently encourages remand, it would still appear to permit dismissal.

ensuring that the Pennsylvania appellate courts have a proper, certified record upon which to decide appeals. Petitioner failed to satisfy his duties as a party before Pennsylvania's appellate courts to ensure the creation and presence of such a record. He was harshly, but properly, sanctioned for that failure. The imposition of that sanction was neither arbitrary nor capricious and, therefore, violated no constitutional rights.

2. Even if one accepts petitioner's erroneous premise that his appeal was dismissed solely because of the negligence of the clerk of the lower court, his due process claim must fail. In Pennsylvania, errors of judicial officials can be redressed through the tort system. *Petticord v. Joyce*, 516 Pa. 35, 531 A.2d 1383 (1987).[7] This Court has repeatedly recognized that the availability of tort remedies is sufficient to satisfy due process with regard to negligent deprivations of property. *Hudson v. Palmer*, 468 U.S. 517 (1984); *Parrat v. Taylor*, 451 U.S. 527 (1981). Accordingly, there is no reason for this Court to review the Superior Court order dismissing petitioner's appeal.

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[7] Obviously, petitioner may also have a cause of action against his own attorney if that lawyer's negligence caused the dismissal of petitioner's appeal. *Dilliplaine v. Lehigh Valley Trust Co.*, 457 Pa. 255, 260, 322 A.2d 114, 117-18 (1974) (Manderino, J., concurring).

CONCLUSION

For the foregoing reasons, respondent respectfully requests that this Court deny petitioner's Petition for Writ of Certiorari.

Respectfully submitted,

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